No. 89-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CITY OF ST. GEORGE,
Petitioner,

v.

PHILLIP L. FOREMASTER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

T.W. SHUMWAY
City Attorney
CITY OF ST. GEORGE
175 East 200 North
St. George, Utah 84770
(801) 634-5800

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
NANCY A. TEMPLE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner
City of St. George, Utah

April 19, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1197

CITY OF ST. GEORGE,

Petitioner,

v.

PHILLIP L. FOREMASTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

SUPPLEMENTAL BRIEF OF PETITIONER

This Court's decision, on April 17, 1990, in *Employment Div., Ore. Dept. of Human Res.* v. *Smith*, No. 88-1213, has greatly increased the significance of one of the questions presented in the petition in this case. The City of St. George currently is seeking review, *inter alia*, of the Tenth Circuit's holding that a "governmental subsidy [that is] not required by the Free Exercise Clause conveys a message of endorsement" in violation of the Establishment Clause. Pet. App. 8a; see Pet. 17-19. To the extent the decision in *Smith* has restricted the range of government subsidies or accommodations that are "required by the Free Exercise Clause," see *infra* page 2, it has expanded the number of government actions that will run afoul of the Establishment Clause under the standard now applicable in the Tenth Circuit.

1. This Court's decision in *Smith* makes it clear that the class of religious conduct and belief that is entitled to constitutional protection under the Free Exercise Clause is more "narrow" than might have been assumed. See *Smith, supra*, slip op. at 5-6; O'Connor, J., concurring at 6; Blackmun, J., dissenting at 2-3. The majority in *Smith* held that a state may forbid an act that is religiously compelled so long as the governmental prohibition is "merely the incidental effect of a generally applicable and otherwise valid provision. . . ." Slip op. at 5-6. This "narrow reading" of the Free Exercise Clause and its protection (O'Connor, J., concurring at 6) thus significantly limits the government's *obligation* to support or accommodate religious conduct and belief.

By restricting the range of state actions that are permissible under the Establishment Clause to those actions that are required by the Free Exercise Clause, the Tenth Circuit's decision—when read in conjunction with *Smith* —would render unconstitutional virtually all state accommodations of or support for religion. Thus, this Court's definition of the scope of protection under the Free Exercise Clause in *Smith* further enhances the need for review at this time of the question presented by petitioner.

2. Contrary to the holding of the Tenth Circuit, this Court in *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890, 901 n.8 (1989), had suggested that state activities that benefit religion need not be mandated by the Free Exercise Clause in order to avoid violating the Establishment Clause. See Pet. App. 17-18. This Court has now reinforced that view of the nexus of the religion clauses in *Smith*:

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

Slip op. at 17. However, while *Smith* more clearly defined the scope of the religious freedom mandated by the Free Exercise Clause, the government's authority to benefit or accommodate religion consistent with the Establishment Clause remains unclear. Petitioner's case presents the appropriate vehicle for determining the proper relationship between the Religion Clauses of the First Amendment.

CONCLUSION

For the foregoing reasons, and those stated in the petition and in the petitioner's reply brief, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

T.W. SHUMWAY
City Attorney
CITY OF ST. GEORGE
175 East 200 North
St. George, Utah 84770
(801) 634-5800

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
NANCY A. TEMPLE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner,
City of St. George, Utah

April 19, 1990

* Counsel of Record